

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

W3

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U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES OF AMERICA

v.

RICHARD M. SCRUSHY,

Defendant.

Case No. CR-03-BE-0530-S

**MOTION OF THE UNITED STATES PURSUANT TO FEDERAL RULE OF
CRIMINAL PROCEDURE 17(c)(2) TO QUASH SUBPOENAS**

Comes now the United States of America, by and through its counsel, Alice H. Martin, United States Attorney for the Northern District of Alabama, and moves this Court to quash subpoenas served by Defendant Richard M. Scrushy upon Internal Revenue Service Special Agent Charles A. Traywick and Clifton Gunderson, LLP ordering them to appear and produce documents on January 22, 2004, at 1:30 p.m., at a hearing on the Defendant's Motion to Modify this Court's Restraining Order dated November 3, 2003. The United States makes this motion pursuant to Federal Rule of Criminal Procedure 17(c)(2).

PROCEDURAL HISTORY

1. On October 29, 2003, the defendant, Richard M. Scrushy (hereinafter, "defendant"), was indicted by a federal grand jury for this district on charges that included conspiracy to commit wire fraud, mail fraud, and securities fraud, in violation of 18 U.S.C. §§ 371, 1341, 1343, and 15 U.S.C. § 78. See United States v. Richard M. Scrushy, CR-03-BE-0530-S (N.D. Ala.). As part of said Indictment, the United States alleged criminal forfeiture of certain property in

which the defendant holds an interest, either as proceeds of specified unlawful activities or as property involved in illegal monetary transactions.

2. In connection with the criminal forfeiture, the United States sought an *ex parte* post-indictment restraining order against specific properties which would, in the event of the defendant's conviction, be subject to forfeiture under 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c), and/or 18 U.S.C. § 982(a)(1). Upon a thorough consideration of the application of the United States and the supporting affidavit of Special Agent Traywick, this Court entered its Restraining Order of November 3, 2003 ("Restraining Order") under the provisions of 21 U.S.C. §853(e)(1)(A), finding probable cause to believe that each of the properties identified in the affidavit was subject to forfeiture to the United States of America.

3. On November 26, 2003, the defendant filed a Motion to Modify the Court's Restraining Order dated November 3, 2003. Although styled as a "motion to modify," the defendant's pleading, in essence, seeks the release of *all* assets previously restrained by this Court.

4. Following receipt of the response of the United States in opposition to the defendant's motion, this Court held a telephone conference with counsel on December 11, 2003, to discuss the defendant's motion. During the conference, the Court informed counsel for the defendant that it was clear under Supreme Court and Eleventh Circuit case law that the defendant did not have a right to a hearing; rather, it was within the Court's discretion as to whether a hearing would be held. The Court further advised defense counsel that it was unclear what relief the defendant was seeking in his motion, and that if the Court did have a hearing, the defendant would first be required to specifically list assets that he claimed fell outside the scope of the

Indictment. Defense counsel acknowledged that obligation.

5. The Court subsequently entered an order dated December 19, 2003 scheduling a hearing on the motion for Thursday, January 22, 2004 at 1:30 p.m.

6. Despite repeated requests from the United States, the defendant refused to specifically identify to the United States or this Court what properties he claims were wrongfully restrained and his support for such contentions until 1:30 p.m. on January 20, 2004, approximately 48 hours prior to the hearing which the Court scheduled one month ago.

THE SUBPOENAS

7. On January 19, 2004, with less than three days before the scheduled hearing, the defendant served a subpoena upon Clifton Gunderson, LLP, an accounting firm retained by the United States. The subpoena commands the testimony of:

[t]he custodian of records AND the person most knowledgeable about any and all work, assistance, guidance, counseling and/or analysis provided by Clifton Gunderson LLP (including any agents or representatives thereof) to or on behalf of the United States (including any agents or representatives thereof) in connection with the restraint of Defendant Richard M. Scrushy's assets.

The subpoena further commands the production of

[a]ny and all documents prepared, utilized, relied upon in connection with, or that in any way relate to, the restraint of Defendant Scrushy's assets imposed by the Court's November 3, 2003 Restraining Order, and all Documents upon which the [designated witness] . . . intends to rely at the January 22, 2004 hearing on Defendant Scrushy's Motion to Modify the November 3, 2003 Restraining Order.

A true, correct and complete copy of the subpoena is attached hereto as Exhibit "A".

8. On January 20, 2004, less than two days before the scheduled hearing, the defendant also served a subpoena upon Special Agent Traywick, one of the investigators assigned to this case. The subpoena commands Special Agent Traywick to testify during the hearing and to

produce,

[a]ny and all documents prepared, utilized, relied upon in connection with, or that in any way relate to, the restraint of Defendant Scrushy's assets imposed by the Court's November 3, 2003 Restraining Order, and all Documents upon which the witness . . . intends to rely at the January 22, 2004 hearing on Defendant Scrushy's Motion to Modify the November 3, 2003 Restraining Order.

A true, correct and complete copy of the subpoena is attached hereto as Exhibit "B".

ARGUMENT

9. Federal regulations prohibit the production or disclosure of any material, documents, testimony, or information relating to material contained in the files of the Department of Justice (hereinafter, "Department"). This prohibition also applies to any information acquired by any person while such person was an employee of the Department as a part of the performance of that person's official duties or because of that person's official status without consideration of the factors set forth in 28 C.F.R. § 16.26(a), or if any of the factors specified in 28 C.F.R. § 16.26(b) exist, without the express prior approval by the Assistant Attorney General in charge of the division responsible for the case or proceeding. 28 C.F.R. § 16.23.

10. For purposes of the above federal regulations, both Special Agent Traywick and Clifton Gunderson, LLP are employees of the Department of Justice ("DOJ") and the subpoenas were directed to them in that capacity.¹ Compliance with the subpoena by Mr. Traywick would require him to produce or disclose information acquired as part of the performance of his official duties or because of his official status as a part of the investigation underlying this criminal

¹ "Employee of the Department" includes ". . . all officers and employees of the United States appointed by, or subject to the supervision, jurisdiction, or control of the Attorney General of the United States . . .". 28 C.F.R. §16.21(b).

prosecution.

11. On January 20, 2004, the defendant, after serving a subpoena upon Clifton Gunderson, LLP, and contemporaneously with the service of his subpoena upon special Agent Traywick, in general advised the United States that pursuant to 28 C.F.R. § 16.23 he was seeking “. . . the testimony of Agent Traywick and a representative of Clifton Gunderson (for whom a subpoena has been separately served) in order to challenge the factual assertions and analysis set forth in the Traywick Affidavit that formed the basis for the Restraining Order . . .”. (See Exhibit “B”). The subpoenas also seek the production of any and all documents prepared, utilized, and relied upon in connection with the restraint of defendant’s assets. However, the undersigned counsel, after consideration of the factors set forth in 28 C.F.R. § 16.26(a) & (b), declines to approve such testimony or to authorize the disclosure of such documents. Furthermore, the Assistant Attorney General for the Criminal Division has not authorized the requested disclosures.

12. For the reasons which follow, the requested disclosures are inappropriate under the Federal Rules of Criminal Procedure, the Jencks Act, and attorney work product doctrine. *See* 28 C.F.R. § 16.26(a)(1). In fact, the Jencks Act, 18 U.S.C. § 3500(a), prohibits production of much of the subpoenaed material.

13. The requested disclosures would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired. *See* 28 C.F.R. § 16.26(a)(1) & (2) & (b)(1) & (5).

14. Moreover, absent approval by the appropriate officials, neither Special Agent

Traywick nor Clifton Gunderson, LLP can be required to testify or to produce the requested documents. *See United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951); 28 C.F.R. § 16.28.² The defendant has not even attempted to obtain the necessary approval for the testimony of the two government employees.

15. The United States has produced and/or is in the process of producing all discovery to which the defendant is entitled pursuant to Rule 16 of the Federal Rules of Criminal Procedure and this Court's order dated December 29, 2003, including all financial records relied upon in the tracing of the defendant's assets. The subpoenas served by the defendant this week seek, at a minimum, all of the records previously produced or which are being produced by the United

² In conformity with federal regulations and applicable case law, special agent Traywick and Clifton Gunderson, LLP, can neither be compelled to testify nor held in contempt for their refusal to testify. As provided by 28 C.F.R. § 16.22, an employee of the Department of Justice and/or Internal Revenue Service may not testify before any court or disclose any information in the custody and control of the Department in proceedings in which the United States is a party without express prior approval and authorization of the responsible DOJ official. The Supreme Court has long recognized the authority of agency heads to restrict testimony of their subordinates through regulations. *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951); *Boske v. Comingore*, 177 U.S. 459 (1900). The regulations, commonly known as "Touhy" regulations, have been promulgated by the Department of Justice Order No. 3229. *Touhy*, 340 U.S. at 467.

In the *Touhy* decision, the Supreme Court held that a subordinate federal officer could not be found in contempt of court for refusing to produce subpoenaed documents where his refusal was based upon a Department of Justice regulation prohibiting disclosure of nonpublic documents without authorization from the Attorney General. *Touhy*, 340 U.S. at 468. The Court rejected the contention that the regulation invaded the authority of the courts to determine the admissibility of evidence. 340 U.S. at 468-69.

Cases since *Touhy* have affirmed consistently the validity of similar regulations, establishing that agencies have discretion in responding to a subpoena. *See, e.g., United States v. Bizzard*, 674 F.2d 1382, 1387 (11th Cir. 1982); *Boron Oil Co. v. Downie*, 873 F.2d 67, 69 (4th Cir. 1989), ("*Touhy* is a part of an unbroken line of authority which directly supports [the] contention that a federal employee may not be compelled to obey a subpoena contrary to his federal employer's instructions under valid agency regulations."); *Swett v. Schenk*, 792 F.2d 1447, 1452 (9th Cir. 1986) (*Touhy* doctrine is jurisdictional, precluding a court from compelling a federal employee to testify, regardless of the agency's reasons); *Louisiana v. Sparks*, 978 F.2d 226, 234 (5th Cir. 1992) ("As the Supreme Court has long held, such regulations unquestionably give Justice Department employees the authority, when so ordered by supervisors, to refuse to comply with a subpoena ordering disclosure of confidential files when the United States is not a party to a legal action."). *See also David Enterprises v. EPA*, 877 F.2d 1181 (3rd Cir. 1989) (refusing to overturn agency's decision not to allow testimony by agency employee).

States pursuant to Rule 16 and this Court's discovery order. The defendant's attempt to force the United States to produce massive amounts of records three times via the subpoenas at issue herein is unreasonable and oppressive.

16. By his unreasonable, generally worded subpoenas, the defendant also appears to be seeking the disclosure of internal reports and documents prepared by government agents. However, the defendant is clearly not entitled to such documents under the Federal Rules of Criminal Procedure. Rule 16(a)(2), "Information Not Subject to Disclosure", states "[e]xcept as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case." *See* FED. R. CRIM. P. 16(a)(2).

17. The defendant may not subpoena the statement of a witness or of a prospective witness under Rule 17 of the Federal Rules of Criminal Procedure. Disclosure of any such statements are controlled by Rule 26.2 of the Federal Rules of Criminal Procedure and the Jencks Act, 18 U.S.C. §3500, neither of which requires production of any such statements at a pretrial hearing challenging a restraining order. *United States v. Jordan*, 316 F.3d 1215, 1225-30 (11th Cir. 2003); *United States v. Hodges*, 489 F.2d 212, 213 (5th Cir. 1973).³

18. Moreover, the attorney work product doctrine, which is applicable to criminal cases, protects not only materials prepared by an attorney in anticipation of litigation from

³The defendant also makes a passing reference to *Brady* as support for his subpoenas. *See Brady v. Maryland*, 373 U.S. 83 (1963). *Brady*, is not applicable to the proceeding before this Court, however, as it applies only to rights to a fair trial; it does not have application to a pretrial hearing. *See, e.g., United States v. Ruiz*, 536 U.S. 622, 630 (2002), in which the United States Supreme Court emphasized that *Brady* and *Giglio* relate to trial rights, not other proceedings.

disclosure, but also protects material prepared by agents for the attorney. *United Kingdom v. United States*, 238 F.3d 1312, 1321-22 (11th Cir. 2001); *In re Grand Jury Proceedings*, 601 F.2d 162, 171 (5th Cir. 1979).

19. The defendant is attempting to circumvent pretrial discovery in this criminal case in order to obtain information to which he is not entitled and/or to engage in a general fishing expedition.

20. The United States Court of Appeals for the Fifth Circuit has recently observed that, when dealing with challenges to post-indictment pre-trial restraining orders, district courts should not permit defendants to examine government witnesses without first producing some evidence suggesting that the restrained assets were untainted. *United States v. Melrose East Subdivision*, No. 02-30743, 2004 WL 52406, at *10 (5th Cir. Jan. 13, 2004).

21. Compliance with the subpoenas at issue herein is not required under the applicable law and would also be unreasonable and oppressive. Therefore, this motion to quash the subpoenas should be granted.

CONCLUSION

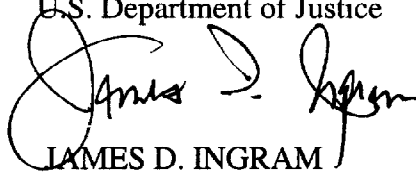
Wherefore, for the foregoing reasons the United States respectfully requests that this Honorable Court quash the subpoenas served by the defendant upon Special Agent Charles A. Traywick and Clifton Gunderson, LLP.

Respectfully submitted,

ALICE H. MARTIN
United States Attorney
Northern District of Alabama



RICHARD C. SMITH
Deputy Chief, Fraud Section
Criminal Division
U.S. Department of Justice



JAMES D. INGRAM
Assistant United States Attorney
1801 Fourth Avenue North
Birmingham, Alabama 35203
(205) 244-2130

ROBERT P. BOYER, JR.
THOMAS J. PINDER
Trial Attorneys
Asset Forfeiture Money Laundering Section
Criminal Division
U.S. Department of Justice

United States District Court

NORTHERN

DISTRICT OF

ALABAMA

UNITED STATES OF AMERICA,

v.

RICHARD M. SCRUSHY,
Defendant.

SUBPOENA IN A CRIMINAL CASE

CASE NUMBER: CR-03-BE-0530-S

TO:

Clifton Gunderson LLP, 4041 Powder Mill Road, Suite 410, Calverton, Maryland 20705
Telephone (301) 931-2050

* Custodian of records AND representative most knowledgeable about the items described
in Part I of "Attachment A," hereto.

☒ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time
specified below to testify in the above case.

PLACE United States District Court for the Northern District of Alabama
Hugo L. Black U.S. Courthouse
1729 Fifth Street North
Birmingham, AL 35203
(205) 278-1700

COURTROOM
5A

DATE AND TIME
January 22, 2004 at 1:30 p.m.

☒ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

See Part II of "Attachment A," hereto.

U.S. MAGISTRATE JUDGE OR CLERK OF COURT

Henry D. Mathis

(By) Deputy Clerk

U. Berry

ATTORNEY'S NAME, ADDRESS AND PHONE NUMBER:

Abbe David Lowels, Esq., Chadbourne & Parke LLP, 1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036; Telephone: 202-974-5600

DATE

January 16, 2004



PROOF OF SERVICE

RECEIVED
BY SERVER

DATE _____

PLACE**SERVED**

DATE _____

PLACE

SERVED ON PRINT NAME: 1

FEES AND MILEAGE TENDERED TO WITNESS

☐ YES ☐ NO

AMOUNT \$ _____

SERVED BY (PRINT NAME)

TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____ Date

Date _____

Signature of Server

Address of Server

ADDITIONAL INFORMATION

ATTACHMENT A

Part I

The custodian of records AND the person most knowledgeable about any and all work, assistance, guidance, counseling and/or analysis provided by Clifton Gunderson LLP (including any agents or representatives thereof) to or on behalf of the United States (including any agents or representatives thereof) in connection with the restraint of Defendant Richard M. Scrushy's assets.

Part II

Any and all Documents prepared, utilized, relied upon, or that in any way relate to the restraint of Defendant Scrushy's assets imposed by the Court's November 3, 2003 Restraining Order, and all Documents upon which the witnesses produced in response to this subpoena intend to rely at the January 22, 2004 hearing on Defendant Scrushy's Motion To Modify the November 3, 2003 Restraining Order.

As used herein, the term "Document" means records and all other tangible forms of expression, recordation or communication, whether originals or copies, and however created, produced, stored or transcribed (manually, mechanically, electronically, in ordinary or machine language or otherwise), including but not limited to books, papers, files, notes, accounts, account statements, confirmations, correspondence, memoranda, reports, telegrams, telexes, telephone logs, records of conversations or meetings, contracts, agreements, calendars, summaries, invoices, bills, records of billings, checks, wire transfers, records of payment, magnetic tapes, tape recordings, film, video recordings, disks, disk packs, and other electronic media, microfilm, microfiche, and storage devices.

LAW OFFICE OF

Arthur W. Leach
Attorney at Law¹
2310 Marin Drive
Birmingham, Alabama 35243
E-mail artleach3@aol.com
TEL: 404-786-6443
FAX: 205-824-0321

January 20, 2004

VIA HAND DELIVERY AND EMAIL

Mr. James D. Ingram
Assistant United States Attorney
Northern District of Alabama
1801 Fourth Avenue North
Birmingham, Alabama 35203

Re: United States v. Richard M. Scrushy

Dear James:

Attached to this letter you will find a subpoena for Agent Traywick, for whom you agreed to accept service. Pursuant to 28 C.F.R. § 16.23, please be advised that Defendant Scrushy seeks the testimony of Agent Traywick and of a representative of Clifton Gunderson (for whom a subpoena has been separately served) in order to challenge the factual assertions and analysis set forth in the Traywick Affidavit that formed the basis for the Restraining Order that is the subject of the hearing on January 22, 2004.

On numerous occasions, in person and in writing, I have requested the report and/or materials from Clifton Gunderson LLP. Based upon my review of the Traywick affidavit and the conclusion he draws that untainted funds were tracked through the accounting, I now believe that you also have a responsibility under Brady to turn those records over to the defense. As I have stated previously, we request this information because without it, understanding the assumptions and allocations of assets made by the government's accountants and Agent Traywick will be impossible.

In my previous letter to you I pointed out that there were financial statements missing in the discovery. We are unable to locate any statements for the trusts set up for the Scrushy children. Our review leads us to believe that these assets are untainted. As you probably know these accounts were initially held by Salomon Smith Barney and then

¹ Arthur W. Leach is licensed to practice in Georgia. He is admitted to practice pro hac vice in the case of United States v. Scrushy

Mr. James D. Ingram
January 20, 2004
Page 2

were transferred to Morgan Stanley. We also can not locate any statements for Mr. Scrushy's Oppenheimer Account. Finally, the UBS Warberg account that fed into the Morgan Stanley account cannot be located. I would greatly appreciate your response on these accounts because we have insufficient records to complete our evaluation.

Thank you for your prompt attention to these issues.

Sincerely,


Arthur W. Leach

Enclosure as stated

United States District Court

NORTHERN

DISTRICT OF

ALABAMA

UNITED STATES OF AMERICA,

v.

SUBPOENA IN A CRIMINAL CASE

CASE NUMBER: CR-03-BE-0530-S

RICHARD M. SCRUSHY,
Defendant.

TO:

Charles A. Traywick, Internal Revenue Service, 801 Tom Martin Drive, Birmingham,
Alabama, 35211; Telephone: (205) 912-5333

☒ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE

COURTROOM

United States District Court for the Northern District of Alabama
Hugo L. Black U.S. Courthouse
1729 Fifth Street North
Birmingham, AL 35203
(205) 278-1700

5A

DATE AND TIME

January 22, 2004 at 1:30 p.m.

☒ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

See "Attachment A," hereto.

U.S. MAGISTRATE JUDGE OR CLERK OF COURT

Henry D. Mathias

(By) Deputy Clerk

Y. Berry



DATE

January 16, 2004

ATTORNEY'S NAME, ADDRESS AND PHONE NUMBER:

Abbe David Lowell, Esq., Chadbourne & Parke LLP, 1200 New Hampshire Avenue, N.W.,
Washington, D.C. 20036; Telephone: (202) 974-5600.

PROOF OF SERVICE

RECEIVED
BY SERVER

DATE

PLACE

SERVED

DATE

PLACE

SERVED ON (PRINT NAME)

FEES AND MILEAGE TENDERED TO WITNESS

☐ YES ☐ NO

AMOUNT \$ _____

SERVED BY (PRINT NAME)

TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____

Date

Signature of Server

Address of Server

ADDITIONAL INFORMATION

ATTACHMENT A

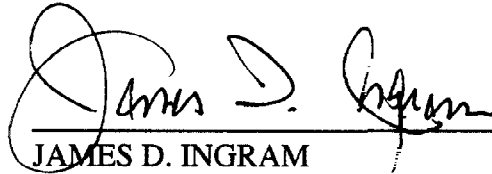
Any and all Documents prepared, utilized, relied upon in connection with, or that in any way relate to, the restraint of Defendant Scrushy's assets imposed by the Court's November 3, 2003 Restraining Order, and all Documents upon which the witness to whom this subpoena is directed intends to rely at the January 22, 2004 hearing on Defendant Scrushy's Motion To Modify the November 3, 2003 Restraining Order.

As used herein, the term "Document" means records and all other tangible forms of expression, recordation or communication, whether originals or copies, and however created, produced, stored or transcribed (manually, mechanically, electronically, in ordinary or machine language or otherwise), including but not limited to books, papers, files, notes, accounts, account statements, confirmations, correspondence, memoranda, reports, telegrams, telexes, telephone logs, records of conversations or meetings, contracts, agreements, calendars, summaries, invoices, bills, records of billings, checks, wire transfers, records of payment, magnetic tapes, tape recordings, film, video recordings, disks, disk packs, and other electronic media, microfilm, microfiche, and storage devices.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following by hand delivery on this 21ST day of January, 2004:

Arthur W. Leach, Esquire
2310 Marin Drive
Birmingham, Alabama 34243

A handwritten signature in black ink, appearing to read "James D. Ingram", is written over a horizontal line.

JAMES D. INGRAM
Assistant United States Attorney
Northern District of Alabama
1801 Fourth Avenue North
Birmingham, Alabama 35203
TEL: (205) 244-2130
FAX: (205) 244-2182